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IN THE

Supreme Court of the United States

October Term, 1968
No. 409

LOS ANGELES HERALD EXAMINER, a Division of The Hearst Corporation, and THE SAN FRANCISCO EXAMINER, a Division of The Hearst Corporation, *Petitioners,*

vs.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellants in proceedings before the United States Court of Appeals for the Ninth Circuit, *Respondents,*

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellee in proceedings before the United States Court of Appeals for the Ninth Circuit, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. In their Brief in Opposition to Petition for a Writ of Certiorari, respondent unions assert that this Court in *Local 283, UAW v. Scofield*, 382 U.S. 205 (1965) expressly confined the scope of its ruling to the question of intervention in review proceedings under § 10(e) and (f) of the National Labor Relations Act.[1] But the language of *Scofield* plainly shows that the Court was not limiting the rationale of its opinion to review proceedings under § 10(e) and (f) as distinct from review proceedings under other subdivisions of Section 10 of the Act. The Court stated:

> "The Labor Act does . . . not provide explicitly for intervention at the appellate court level. . . . Similarly, no specific standards govern the propriety of intervention in Labor Board review proceedings. . . .
>
> "Lacking a clear directive on the subject, we look to the statutory design of the Act. [Citation omitted]. Of course, in considering the propriety of intervention in the courts of appeals, our discussion is limited to Labor Board review proceedings. *Federal agencies are not fungibles* for intervention purposes — Congress has treated the matter with attention to the *particular statutory scheme and agency*." (382 U.S. at 209-210). [Emphasis added].

Obviously the court was merely disclaiming any applicability of its opinion to review proceedings involving

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[1] Respondent Unions' Brief in Opposition, p. 5.

agencies and statutory schemes other than the Board and the National Labor Relations Act.

Moreover, the Court's opinion in *Local 133, UAW v. Fafnir Bearing Co.*, the second of the two cases consolidated for determination in *Scofield*, did not rely upon the statutory scheme of § 10(e) and (f) to the exclusion of the other sections of the Act. The Court looked to the "statutory machinery" of the Act generally, observed that "the Labor Act recognizes the existence of private rights within the statutory scheme" (382 U.S. at 218), and concluded that the "statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests." (382 U.S. at 220). There is thus no basis for asserting that the holding in *Fafnir* is based upon a narrow premise confined to the scheme of § 10(e) and § 10(f) of the Act.

2. Respondents have also contended that the Court's decision in *Scofield* was dictated by a need to avoid the duplication in appellate proceedings and possible "circuit shopping" that would occur were intervention in § 10(e) and § 10(f) proceedings denied. Respondents then argue that a denial of intervention in a § 10(1) appeal would not give rise to a similar risk of duplication in appellate proceedings.[2] This argument wholly fails to take into account the factual distinction between the two separate and distinct cases which were consolidated for hearing and determination in *Scofield*.

The first case, *Local 283, UAW v. Scofield*, was on a writ of certiorari to the Seventh Circuit and involved

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[2] Respondent Unions' Brief in Opposition, pp. 6-8.

the question of whether a charged party who had been successful in proceedings before the Board could intervene in a § 10(f) review proceeding initiated by the unsuccessful charging party. The second case, *Local 133, UAW v. Fafnir Bearing Co.*, was on a writ of certiorari to the Second Circuit and involved the question of whether a successful charging party could intervene in § 10(e) enforcement and § 10(f) review proceedings. In the first case the Court did emphasize that if a successful charged party were not allowed to intervene in § 10(f) review proceedings, such proceedings might eventually result in a reversal and remand to the Board for the issuance of an order, in which case the charged party would then be entitled, as a party "aggrieved", to relitigate in a subsequent appeal the same questions litigated in the first appeal. This consideration, however, was demonstrably not material to the Court's decision in *Fafnir*, which involved, as here, the intervention rights of a successful "charging party". As stated by the Court:

> "The problem of whether intervention should be granted to the successful charging party to the Labor Board proceedings presents considerations somewhat distinct from the case of the intervening charged party. Resolution of the problem is no easy matter, and it is understandable that the courts have divided on the issue." (382 U.S. at 217).

One of the distinctions which the Court may have had in mind is that denial of intervention to a successful charging party does not involve the risk of duplicating

appellate proceedings which would be encountered in denying intervention to a successful charged party. In the former case the risk is great; in the latter case, as in *Fafnir*, the risk is remote. When a court of appeals reverses a Board decision which had been in the charging party's favor, rarely is the case remanded to the Board for entering of an order from which the charging party would be entitled to appeal as a "party aggrieved" under § 10(f). For example, in the fiscal year 1965, there were 197 decisions rendered by the courts of appeals involving cases where the charging party had been successful before the Board. Of these, the courts finally disposed of 192, or 97 percent, without the necessity of a remand to the Board.[3] Of the three percent of the cases remanded to the Board, it is very probable that the Board affirmed its prior decision in a substantial proportion of such cases, thus further reducing the percentage of cases where the charging party could bring a second appeal as a "party aggrieved". Thus, it is apparent that in cases involving a successful charging party, the avoidance of duplicity of appellate proceedings could not be, and in *Fafnir* was not, the basis for granting intervention. Indeed, the Court's opinion in *Fafnir* did not even advert to the subject of avoiding duplication of appeals other than to mention cursorily in a final footnote that disallowance of intervention by the charging party "could lead to duplicity in appellate review." (382 U.S. at 222 n. 20).

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[3] Thirtieth Annual Report of the National Labor Relations Board at 212.

However, it should be noted that permitting the successful party to intervene in § 10(1) appeals could prevent duplicity in appellate proceedings and the possible "circuit shopping" resulting therefrom. This would occur, for example, where the reviewing court in a § 10(1) appeal reverses the district court, holding on purely legal grounds and undisputed facts that there is no reasonable cause to believe the charge is true since the matter in controversy does not satisfy the Act's jurisdictional requirement of involvement in interstate commerce. If the Board subsequently dismissed the complaint on the same grounds, the charging party would be an aggrieved party entitled under § 10(f) to petition for review in the Court of Appeals for the District of Columbia, and this would enable him, if he had not been permitted to intervene in the § 10(1) appeal, to relitigate the very issue which had been adjudicated in the previous appeal. On the other hand, if the charging party had been allowed to intervene in the § 10(1) appeal, that court's jurisdictional finding, based upon purely legal grounds and undisputed facts, would be the law of the case and would be binding upon the charging party were he to attempt an appeal from the subsequent adverse decision by the Board.

Ultimately, however, to focus upon the incidental effect of avoiding duplicity in appeal proceedings is to ignore the reasons for intervention which were stressed by the Court in *Fafnir*. The Court in *Fafnir* emphasized two considerations: The interblending of private and public rights in the "intricate statutory scheme" (382 U.S. at 220) and the capriciousness that would result

in "refusing to afford the successful party . . . an opportunity tantamount to that of the unsuccessful party in persuading an appellate court." (382 U.S. at 222). These considerations, and those which the Court discussed in *Scofield,* apply with equal force in support of the right of a successful charging party to intervene in § 10(1) appeals.

3. Respondents have attempted, finally, to challenge petitioners' right to appellate intervention by obliquely raising issues which are not before the Court — the questions of whether charging parties may intervene at the district court level of § 10(1) proceedings and whether they may institute contempt proceedings. Respondent Kennedy states, without any citation of authority, that the charging party does not become a party to the district court proceedings and that he therefore could not be presumed to have greater rights on appeal.[4] The respondent unions argue that if the successful charging party can intervene in § 10(1) appeals, he could also possibly intervene in the district court proceedings, appeal therefrom, and initiate contempt proceedings.[5]

Aside from obscuring the issue before the Court, these arguments rest upon three unfounded assumptions: (1) that intervention at the district court level is barred by the

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[4]As of the time of printing the instant Reply Brief, petitioners have not received a copy of Respondent Kennedy's Brief in Opposition. The above argument was made, however, by Kennedy in his opposition to petitioners' application for stay of proceedings in the Ninth Circuit.

[5]Respondent Unions' Brief in Opposition, p. 15.

Act; (2) that intervenors would have standing to institute contempt proceedings; and (3) that the right of appellate intervention necessarily presupposes recognition of a right for the charging party to participate in the district court proceedings as a formal party.

Contrary to the first assumption, the courts have held that charging parties are entitled to intervene as a matter of right in § 10(1) district court proceedings. *Penello v. Plumbers Union,* 41 LRRM 2269 (E.D. Va. 1957); *Davis v. Hotel & Restaurant Employees & Bartenders Intl. Union, Local 246,* No. 66-68 (D.C. Okla. 1966) (unreported); *Kennedy v. Retail Clerks Union, Local 137,* No. 65-34-S (S.D. Cal. 1965) (unreported).[6] In *Plumbers Union,* the court stated:

> "The court is of the opinion that the Council [the charging party] is entitled to intervene and be made a party to the action. *Section 10(1) of the Act plainly authorizes participation by the charging*

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[6]Both *Davis* and *Retail Clerks Union* are discussed in Thirty-first Annual Report of the National Labor Relations Board at 155-56 (1967). In *Retail Clerks Union,* the district court permitted the charging parties to intervene in § 10(1) proceedings. Thereafter, the district court issued a temporary injunction over the objection of the Regional Director who had entered into a stipulation with the charged union, providing for a lesser form of relief. On appeal, the Ninth Circuit affirmed the district court's power to grant relief not sought by the Regional Director and held that the district court did not "err in permitting the charging parties to appear and present evidence in support of the injunction." *Retail Clerks Union v. Food Employers Council, Inc.,* 351 F.2d 525, 528 (9 Cir. 1965). But notwithstanding the fact that the charging parties had properly been permitted to intervene in the district court proceedings, the court denied them leave to intervene in the appeal proceedings.

> *party. Intervention is necessary to implement this right.* Mine Workers v. Eagle Picher, 1945, 325 U.S. 335, 338, 16 LRRM 689; Edison Co. v. Labor Board, 1938, 305 U.S. 197, 218, 3 LRRM 645. However, the intervenor alone has no standing to ask for an injunction or other relief." (41 LRRM at 2271). [Emphasis added].

As the court noted, § 10(1) unequivocally requires that charging parties be permitted to participate fully in the district court proceedings. In the words of the Act, "the charging party . . . *shall* be given an opportunity to appear by counsel and present any relevant testimony."[7] Unlike § 10(b), which makes participation in Board proceedings depend upon "the discretion of the . . . Board," § 10(1)'s mandatory language expresses a clear congressional intention favoring intervention. Thus, if it be assumed that the right of appellate intervention depends upon the would-be intervenor's rights of participation in the precedent trial or hearing proceedings, § 10(1) presents a much stronger case for appellate intervention than does § 10(e) and § 10(f).

As for the second assumption, the Court in *Scofield* laid this issue to rest when it pointed out that there is "nothing inconsistent in denying the right of a private party to institute a contempt proceeding . . . and, on the other hand, in permitting intervention in a proceeding already in the court for decision." (382 U.S. at 221). In *Davis, supra,* the court relied on *Scofield* in holding that a charging party who has been allowed to intervene

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[7]Emphasis added.

in a § 10(1) proceeding does not have standing to institute proceedings for a § 10(1) injunction.

Finally, contrary to the third assumption, the right of intervention in § 10(1) appeals clearly does not presuppose a right of intervention in § 10(1) district court proceedings. As the court in *Scofield* stated, "the considerations involved in determining whether the charging party has certain rights before the Board are not dispositive of the question of appellate intervention." (382 U.S. 219 n. 15). Similarly, the question of intervention in § 10(1) appeals is not dispositive of, nor controlled by, the issue of intervention at the district court level.

In sum, the question of the right of charging parties to intervene in § 10(1) district court proceedings is not before this Court and need not be decided by it. And to the extent that that issue might be relevant by way of analogy, the cases upholding the right of charging parties to intervene in § 10(1) district court proceedings provide the clincher in support of petitioners' right to intervene in the appeals proceedings in the court below.

CONCLUSION

For the aforementioned reasons, as well as those stated in the Petition for a Writ of Certiorari, petitioners pray that the Petition for a Writ of Certiorari be granted.

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